

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

SPENSER S. WOODS, SR.;
Complainant,

vs.

**DOCKET NO. EMra97120902
EEOC NO. 240962252**

PAVE PRO, INC.;
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 17, 2003, Robert D. Lange, Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission (ICRC), entered his Proposed Findings Of Fact, Conclusions Of Law, And Order (the proposed decision).

No objections have been filed to the ICRC's adoption of the proposed decision.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

Dated: 25 April 2003

To be served by first class mail on the following parties and attorneys of record::

Spenser S. Woods, Sr.
2521 North Broadway Street
Indianapolis, IN 46205-4239

Pave Pro, Inc.
c/o Larry D. Stanley, Vice President
1110 South Webster Avenue
Indianapolis, IN 46203-2659

POYNTER & RUBICK P.C.
BY: Steven J. Rubick
Attorneys for Respondent Pave Pro, Inc.
8193 East 21st Street
Indianapolis, IN 46219-2576

and to be personally served on the following attorney of record:

Frederick S. Bremer, Staff Attorney
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

SPENCER S. WOODS, SR.;
Complainant,

v.

**DOCKET NO. EMra97120902
EEOC NO. 240962252**

PAVE PRO, INC.;
Respondent.

**SECOND PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

A Hearing was held on January 7, 2003 before the undersigned Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission (ICRC). Complainant - Spencer S. Woods, Sr. ("Woods") - was present and was represented by counsel, Frederick S. Bremer, Staff Counsel with the ICRC. Respondent - Pave Pro, Inc. ("Pave Pro") – was represented by counsel, Steven J. Rubick of the Indianapolis firm of POYNTER & RUBICK P.C. Also present on behalf of Pave Pro was David A. Warner (Warner), former Vice-President of Pave Pro.

The parties waived opening statements and the deposition of Larry D. Stanley (Stanley) was admitted by agreement. Woods testified on his own behalf and also called Jacqueline I. Williams (Williams). During the presentation of Woods' case, Complainant's Exhibit 1 (CX1) and Respondent's Exhibit A (RX__) were admitted into evidence without objection. Warner testified on behalf of Pave Pro and, during the presentation of Pave

Pro's case, RXB was admitted into evidence without objection. The parties elected to waive oral closing arguments. The ALJ ordered that the parties file what they suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before February 20, 2003 and the cause was taken under advisement.

On February 20, 2003, Woods filed his Tender Of [Suggested Proposed] Findings Of Fact, Conclusions Of Law And Order As Proposed By Complainant. Pave Pro was granted an extension of time until February 28, 2003. Pave Pro belatedly filed Defendant's (sic) Tender Of Proposed Findings Of Fact on March 12, 2003.

Having carefully considered the foregoing and being duly advised in the premises, the ALJ proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The issues to be resolved in this case are whether Woods was constructively discharged because of racial harassment and, if so, what relief should be awarded. FOURTH PRE-HEARING ORDER, ¶1 (December 16, 2002).
2. Woods has been, at all material times, an adult African American man residing in the state of Indiana.
3. Pave Pro was, at all material times, an Indiana for profit business engaged in the construction and/or paving of driveways, parking lots, and other surfaces. There is no evidence that Pave Pro, at any material time, employed less than 6 persons for wages or salary within the state.
4. Woods began employment with Pave Pro in April of 1996 as a grader.
5. During the course of his employment with Pave Pro, Woods worked with a crew including Mike Henderson (Henderson), the crew leader and Woods' immediate supervisor, and Victor Pierce (Pierce). Both Henderson and Pierce and Pierce are Caucasians.

6. Generally, Woods and the crew with which he worked did so at sites outside of Indianapolis in predominantly white communities. They did so after meeting at Pave Pro headquarters in Indianapolis and traveling to the job site in a Pave Pro truck.
7. Pierce and Henderson began making racially charged remarks on a fairly regular basis. Specifically, those remarks included the following:
 - A. They said that they didn't like white guys that walked around with sagging pants and bald heads trying to be like blacks.
 - B. After seeing an interracial couple, they said there were going to be church burnings.
 - C. When leaving work, Pierce would always gesture to Woods by raising his fist while saying "white power" or "heil Hitler".
8. Woods told Pierce and Henderson that he did not appreciate their racial comments and asked them to stop making them, but they did not comply with his request.
9. Woods complained to Stanley twice about what the men were saying and doing. Stanley told Woods that he thought the men meant nothing and that it was probably a joke. Stanley did say that he would have a talk with Pierce.
10. Henderson and Pierce continued to engage in the offensive behavior.
11. Woods began to feel very uncomfortable and even threatened in view of the following:
 - A. Woods was the only black employee in the work crew and was working in predominantly white communities.
 - B. Most of the time, members of the work crew worked by themselves, isolated from people other than crew members.
 - C. Another crew member named Bill had openly acknowledged to Woods that he was prejudiced, did not like blacks, and did not like the idea of having to work with Woods
 - D. Once, Woods was required to descend into a manhole alone to see which way a line was running. While he was there, Bill and another crew member, James Rice, kicked "little rocks and stuff" into the hole.

E. Pierce evidently learned that Woods had complained about his behavior as he called him a snitch. After that, when Woods noticed Pierce hovering around the area where crew members kept their lunch and saw Pierce prowling around in his lunch, Woods would throw away his soda rather than drink it out of concern that Pierce would try to harm him. This happened more than once.

12. On the last day of Woods' employment, Pierce and Henderson started spray-painting the wall of an abandoned building, writing "KKK", "nigger", and "kill nigger". They also drew a swastika and a stick figure being hanged in a hangman's noose. Near this, they sprayed "kill Spencer kill". While Pierce and Henderson were spray-painting, they called out to Woods, asking him to look at each new image, word, or phrase.

13. Following this incident, Woods was scared of his co-workers and was inclined to believe that management would do nothing about his concerns. As a result, Woods quit on July 26, 1996, even though he needed the income.

14. A reasonable person in the same position as Woods would have felt compelled to resign.

15. At the time of Woods' termination, he was paid at the rate of \$10.50 per hour for 40 hours per week and was working 10 to 15 hours a week of overtime.

16. Had Woods continued his employment at Pave Pro, he would have been laid off in December of every year until April of the next year.

17. After leaving Pave Pro, Woods searched for employment but was hampered by having to disclose that he had been convicted of a felony.

18. From July 26, 1996 through November 29, 1996, Woods would have earned a total of \$11,103.75 from Pave Pro. Calculations are shown below.

$\$10.50/\text{hr.} \times 40 \text{ hrs.} \times 18 \text{ weeks} = \$7,560.00$

$\$15.75/\text{hr.} \times 12.5 \text{ hrs.} \times 18 \text{ weeks} = \underline{3,543.75}$

TOTAL **\$11,103.75**

19. Woods did not have other employment in 1996 after he left Pave Pro. Thus, his lost income in 1996 was \$11,103.75.

20. From April 7, 1997 through November 28, 1997, Woods would have earned a total of \$21,590.80 from Pave Pro. Calculations are shown below.

$$\$10.50/\text{hr.} \times 40 \text{ hrs.} \times 35 \text{ weeks} = \$14,700.00$$

$$\$15.75/\text{hr.} \times 12.5 \text{ hrs.} \times 35 \text{ weeks} = \underline{6,890.80}$$

$$\textbf{\$21,590.80}$$

21. In 1997, Woods earned a total of \$7,525.00. CX1. Thus, Woods' lost earnings in 1997 were \$14,065.80.

22. From April 6, 1998 through November 27, 1998, Woods would have earned a total of \$20,973.92 from Pave Pro. Calculations are shown below.

$$\$10.50/\text{hr.} \times 40 \text{ hrs.} \times 34 \text{ weeks} = \$14,280.00$$

$$\$15.75/\text{hr.} \times 12.5 \text{ hrs.} \times 34 \text{ weeks} = \underline{6,693.92}$$

$$\textbf{\$20,973.92}$$

23. In 1998, Woods earned a total of \$879.00. CX1. Thus, Woods' lost earnings in 1998 were \$20,094.92

24. From April 6, 1999 through November 26, 1999, Woods would have earned a total of \$20,973.92 from Pave Pro. Calculations are shown below.

$$\$10.50/\text{hr.} \times 40 \text{ hrs.} \times 34 \text{ weeks} = \$14,280.00$$

$$\$15.75/\text{hr.} \times 12.5 \text{ hrs.} \times 35 \text{ weeks} = \underline{6,693.92}$$

$$\textbf{\$20,973.92}$$

25. In 1999, Woods earned a total of \$5,367.00. CX1. Thus, Woods' lost earnings in 1999 were \$15,606.92.

26. From April 3, 2000 through December 1, 2000, Woods would have earned a total of \$21,590.80 from Pave Pro. Calculations are shown below.

$$\$10.50/\text{hr.} \times 40 \text{ hrs.} \times 35 \text{ weeks} = \$14,700.00$$

$$\$15.75/\text{hr.} \times 12.5 \text{ hrs.} \times 35 \text{ weeks} = \underline{6,890.80}$$

$$\textbf{\$21,590.80}$$

27. In 2000, Woods earned a total of \$16,554.00. CX1. Thus, Woods' lost earnings in 2000 were \$5,036.80.

28. Woods lost a total of \$65,908.19, gross, as a result of being constructively discharged by Pave Pro.

29. About this time, Woods finally obtained a good, permanent job in which he received both better pay and better benefits than he had at Pave Pro. Thus, after 2000, Woods had no more lost earnings.

30. Pave Pro has not proven by a preponderance of the evidence that Woods has failed to make reasonable efforts to mitigate his damages.

31. Woods also lost the use of the income that he would have earned from Pave Pro.

32. Awarding interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated as simple interest at 8% annually, Woods is entitled to interest in the amount of \$35,357.14. Calculations are shown below.

1996	$\$11,103.75 \times .08 \times 22.4/52$	\$ 382.65
1997	$\$25,552.20 \times .08$	2,044.17
1998	$\$47,691.29 \times .08$	3,815.30
1999	$\$71,601.51 \times .08$	5,728.12
2000	$\$82,366.43 \times .08$	6,589.31
2001	$\$88,955.74 \times .08$	7,116.46
2002	$\$96,072.20 \times .08$	7,685.78
2003	$\$103,757.98 \times .08 \times 1/52$	<u>1,995.35</u>
TOTAL		\$35,357.14

33. Although it has not formally dissolved, Pave Pro ceased doing business no later than March of 2001.

34. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the parties.
2. Woods and Pave Pro are each a “person” as that term is defined in section 3(a) of the Indiana Civil Rights Law (the ICRL). IC 22-9-1-3(a).
3. Pave Pro is an “employer” as that term is defined in section 3(h) of the ICRL. IC 22-9-1-3(h).
4. Section 3(l) of the ICRL provides, in material part, as follows:
(l) “Discriminatory practice” means:
 (1) the exclusion of a person from equal opportunities because of race ...;
 ...
Every discriminatory practice relating to ... employment... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).
5. Cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.* (Title VII) are entitled to great weight in the interpretation of the ICRL. *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).
6. Title VII cases establish that racial harassment is unlawful if an employer tolerates racial slurs that are sufficiently severe or pervasive that they adversely affect the ability of the particular plaintiff to perform his or her work and would so affect a reasonable person. *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991).
7. Pave Pro did not take steps reasonably designed to eliminate the hostile environment based upon racial harassment to which Woods was subjected
8. A constructive discharge occurs if an employee feels, reasonably, that working conditions are so intolerable that s/he is compelled to resign to avoid the hostile environment. *Tutman v. WBBM-TV, Inc.*, 209 F.3d 1044 (7th Cir. 2000).

9. Woods has proven by a preponderance of the evidence that he was constructively discharged as the result of unlawful racial harassment for which Pave Pro was responsible.

10. Pave Pro excluded Woods from equal opportunities because of race and thereby committed a discriminatory practice under section 3(l) of the ICRL. Because there is no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).

11. Section 6(k) of the ICRL governs the ICRC's authority upon the finding of an unlawful discriminatory practice and provides that, among its powers and duties, ICRC

... shall state its findings of fact after a hearing and, if the commission finds the person has engaged in an unlawful discriminatory practice, shall cause to be served on this person an order requiring the person to cease and desist from the unlawful discriminatory practice and requiring the person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power:

(A) to restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice.

...

IC 22-9-1-6(k).

12. Woods has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practices.

13. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of the ICRC.

14. Interest should be awarded at an annual rate of 8% compounded annually. This is the rate provided for in IC 24-4.6-1-103, a statute that is appropriate to consult in the absence of a more specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company*, 437 N.E.2d 1381 (Ind.App. 1982).

15. The burden of proof on the issue of mitigation of damages is on the wrongdoer. *Colonial Discount Corp. v. Berkhardt*, 435 N.E. 2d 65 (Ind.App. 1982).

16. Even the dissolution of a corporation does not abate or suspend a proceeding

against that corporation. IC 23-1-45-5(b)(5). Pave Pro's status may affect what is a realistic remedy, but it does not preclude all proceedings.

17. Administrative review of this proposed decision may be obtained by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).

18. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Pave Pro shall immediately cease and desist from subjecting employees to a hostile environment because of race.

2. Pave Pro shall deliver to ICRC a check payable to ICRC as escrow agent for Woods in the amount of \$101,265.33. Of this amount, \$65,908.19 shall be subject to deductions required by law and/or agreement.

3. This Order shall take effect immediately after it is approved and signed by a majority of the members of the ICRC unless it is modified by the ICRC under IC 4-21.5-3-31(a), stayed by the ICRC under IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 17 March 2003

Robert D. Lange
Administrative Law Judge

To be served by first class mail this 17th day of March, 2003 on the following parties and attorneys of record::

Spenser S. Woods, Sr.
2521 North Broadway Street
Indianapolis, IN 46205-4239

Pave Pro, Inc.
c/o Larry D. Stanley, Vice President
1110 South Webster Avenue
Indianapolis, IN 46203-2659

POYNTER & RUBICK P.C.
BY: Steven J. Rubick
Attorneys for Respondent Pave Pro, Inc.
8193 East 21st Street
Indianapolis, IN 46219-2576

and to be personally served this 17th day of March, 2003 on the following:

Frederick S. Bremer, Staff Attorney
Indiana Civil Rights Commission
Attorney for Complainant Spenser S. Woods, Sr.
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

Indiana Civil Rights Commission
c/o Sandra D. Leek, Esq.; Executive Director
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255